IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 2ND JANUARY 2007 / 12TH POUSHA, 1928

WP(C).No. 28267 of 2006(M)

OS.127/2002 of SUB COURT, MANJERI

.....

PETITIONER:

ATHIMANNIL HABEEB, AGED 34,
S/O.LATE MOIDEEN, ANTHIMANNIL HOUSE,
MANJERI AMSOM, DESOM.

BY ADV. SRI.K.S.MADHUSOODANAN
SRI.T.V.JAYAKUMAR NAMBOODIRI

RESPONDENTS:

1. **ASHRAF, S/O.LATE MOIDEEN, ATHIMANNIL HOUSE, MANJERI AMSOM, DESOM.**
2. **SAKEER HUSSAIN, S/O. LATE MOIDEEN, ATHIMANNIL HOUSE, IRUMBUZHI AMSOM, MANJERI DESOM.**
3. **SULFIKKAR,. S/O.LATE MOIDEEN, ATHIMANNIL HOUSE, MANJERI AMSOM.**
4. **KHARIUNNEESSA, D/O.LATE DOIDEEN, -DO -**
5. **NASEEMA, -DO-**
6. **FAIZAL, S/O.LATE MOIDEEN - DO -**
7. **IQBAL, -DO-**
8. **POOZHIKUTHU KADIYUMMA, W/O.LATE MOIDEEN, -DO -**
9. **OTTAKATH MANKARATHODI ABDUL RASHEED, S/O.ABDUL HAMEED, MANJERI AMSOM, DESOM.**

**10. PALAYIL ALAVI HAJI, S/O.AHAMMAD,
KARUVAMBARA ASOM.**

**11. KUNNATHODI MUHAMMADALI HAJI, S/O.MOOSA
HAJI, PONMALA AMSOM.**

**12. SAMANA BUSINESS ESTABLISHMENT PVT.LTD
REP.BY M.D.ABDUL RASHEED, MANJERI AMSOM,
DESOM.**

BY ADV. SRI.P.S.ABDUL KAREEM

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 02/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C) NO.28267/2006

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE PETITION IA.1430/06 IN OS. 127/02 FILED ON 6.10.06 BEFORE THE HONOURABLE SUB COURT, MANJERI.

EXT.P2:- COPY OF THE PETITION IA.1431.06 IN OS. 127/02 -DO-

EXT.P3:- COPY OF THE COMMON ORDER IN IA. 1430/06 & 1431/06 IN OS. 127/02 OF THE SUB COURT, MANJERI DT.18.10.06.

EXT.P4:- COPY OF THE IA.NO.323/05 IN OS. NO.127/02 DT.29.1.05 FILED BY THE PETITIONER

/TRUE COPY/

tss

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO.28267 OF 2006 (M)

Dated this the 2nd day of January, 2007.

J U D G M E N T

Petitioner is plaintiff and respondents the defendants in O.S.127/02, on the file of Sub Court, Manjeri. Suit was filed for partition. Subsequently the plaint was amended, incorporating para 5A in the plaint, raising a contention challenging registered document No. 5512/03. Petitioner subsequently filed Ext.P2 application for amendment of the plaint under Order VI Rule 17 of Code of Civil Procedure seeking deletion of the prayer to set aside the document and to add a further contention with regard to the document. Petitioner also filed Ext.P1 application for refund of the court fee paid for the relief of setting aside the document, consequent to the application for amendment. Under Ext.P3 order, learned sub Judge dismissed both the applications which are challenged in this petition filed under Article 227 of constitution of India.

2. Learned counsel appearing for petitioner and respondents 9 to 11 were heard. Respondents 1 to 5 refused to receive the notice and notice as against them are declared sufficient.

3. After the amendment, the plaint contains six reliefs. The relief of declaration that registered document 5512/03 purported to be

a partition deed is null and abinitio void and not binding on the plaintiff or his share in the properties was incorporated as prayer B. As prayer C, petitioner alternatively sought a decree to set aside the very same document. Court fee has been paid for the said alternative relief sought for. Under Ext.P2 application, petitioner sought to delete the said relief as and also add further plea in para 5A to get the declaration. The question whether petitioner is entitled to the decree, without seeking a relief to set aside the registered document is to be considered by learned Sub Judge only in the suit. The case of petitioner was that as the document is void abinitio and is not valid and binding on the properties or his shares, and in view of the declaration as sought for, petitioner does not want further relief to set aside the document. The amendment application is filed to that effect. I do not find any reason for not permitting the plaintiff to amend the plaint as sought for. The amendment sought for cannot be refused on the ground that by allowing the application, the liability to pay court fee, which originally was there would be taken away. That is not a relevant aspect to be considered while deciding the question whether the amendment sought for is to be allowed or not. The question whether plaintiff is entitled to the decree sought for, without the prayer to set aside the document is also not a matter to be decided

while considering application for amendment. It is the risk of the plaintiff. In such circumstances Ext.P3 order dismissing Ext.P2 application is set aside. Ext.P2 stands allowed as prayed for. Defendants are entitled to file an additional written statement. Learned Sub Judge is directed to pass appropriate order in Ext.P1 application for refund of court fee in accordance with law consequent to the allowing of Ext.P2 application. Learned counsel appearing for contesting respondents submits that learned Sub Judge may be directed to dispose the suit expeditiously. One of the defendants earlier filed W.P.(C).6204/06, for the same relief. This court directed learned Sub Judge to dispose the case expeditiously. Hence there is no necessity to pass any further direction.

M.SASIDHARAN NAMBIAR,
JUDGE.

bkn